No. 75-1477

MAY 10 1976

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1975

DONALD G. LITTLE AND JOHNNIE MOSON, Co-executors of the Estate of Jacqueline Hilen Skelton, a Deceased Osage Indian,

Petitioners,

vs.

THE STATE OF OKLAHOMA AND THE OKLAHOMA TAX COMMISSION,

Respondents.

TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF RESPONDENT OKLAHOMA TAX COMMISSION, IN OPPOSITION

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May, 1976

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No. 75-1477

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1975

DONALD C. LITTLE AND JOHNNIE MOHON, Co-executors of the Estate of Jacqueline Elkins Shelton, a Deceased Osage Indian,

Petitioners,

vs.

THE STATE OF OKLAHOMA AND THE OKLAHOMA TAX COMMISSION,

Respondents.

The Oklahoma Tax Commission prays that this Court deny the Petitioners' Petition for a Writ of Certiorari to the Supreme Court of the State of Oklahoma.

OPINION BELOW

The Opinion of the Supreme Court of Oklahoma involved in this case is reported as *Estate of Jacqueline Elkins Shelton v. Oklahoma Tax Commission*, Okl., 544 P. 2d 495 (1975).

JURISDICTION

The jurisdictional requisites are adequately set forth

in Petitioners' "Petition for a Writ of Certiorari to the Supreme Court of Oklahoma", previously filed herein.

QUESTIONS PRESENTED

1. Is the law set forth in *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948), governing the payment of estate tax on the estates of deceased incompetent Osage Indians controlling as to the estate of a deceased competent Osage Indian?

2. Whether the State of Oklahoma may treat as real property the headrights of a deceased competent non-resident Osage Indian where such headrights represent unaccrued royalty interest in minerals whose situs is in the State of Oklahoma?

3. Whether Internal Revenue Decisions as to the scope of its taxing power have any effect upon the taxing power of the State of Oklahoma?

STATEMENT OF CASE

Jacqueline Elkins Shelton was at the time of her death a competent non-resident Osage Indian. At the time of her death on the 17th day of May, 1967, she possessed certain real and personal properties located in Osage County, State of Oklahoma. In addition, the decedent also possessed 10.77837 Osage headrights.

The term headrights is used to describe "the interest that a member of the tribe has in the Osage tribal trust estate, and the trust consists of the oil, gas and mineral rights, and the funds which were to be placed to the credit of the Osage tribe, all fully set out in the above Act, (Act of June 28, 1906, 34 Stat. 539)", *In Re Dennison*, 38 F. 2d 662, 664, and the "right to receive the trust funds and the mineral interests at the

end of the trust period, and during that period, to participate in the distribution of the bonuses and royalties arising from mineral estates and the interest on trust funds, in an Osage headright." *Globe Indemnity Co. v. Bruce*, 81 F. 2d 143, 148-149.

After the Oklahoma Estate Tax Return was filed by the Petitioners on behalf of the Estate of Jacqueline Elkins Shelton, deceased, the Oklahoma Tax Commission on the 4th day of February, 1970, assessed an additional inheritance tax of $10,375.05, against the decedent's Oklahoma Estate Tax Return of the decedent's 10.77837 Osage Indian headrights.

The valuation of the headrights was calculated by taking the sum of the last four (4) quarters distribution of accrued royalties, and multiplying said sum by six (6), to arrive at a value for the decedent's interest in the royalties in the minerals yet to be reduced to possession. Thus arriving at a value for the decedent's share of the unaccrued royalties.

Thereafter the Petitioners filed their claim for refund before the Oklahoma Tax Commission. Which claim for refund was denied by the Oklahoma Tax Commission, after full hearing thereon, on the 21st day of September, 1973.

The Petitioners thereafter filed their "Notice of Intention to Appeal" to the Supreme Court of the State of Oklahoma from the Order of the Oklahoma Tax Commission denying the taxpayers' claim for refund.

The Supreme Court of the State of Oklahoma held that these 10.77837 Osage Indian headrights were includable in the decedent's net taxable estate for Oklahoma "Estate, Inheritance and Transfer Tax" purposes. The Court further held that these headrights represented the right of the decedent to participate in the distribution of mineral royalties placed in the Treasury of the United States to the credit of the Osage

Indian Tribe, together with the interest on a per capita basis in the mineral estate itself, which headrights are interests in accrued royalties arising from the mineral interest of the Osage Tribe and such unaccrued royalties are real and not personal property.

The Osage Allotment Act of 1906, 34 Stat. 539, divided Osage Tribal lands and funds equally among 2,229 tribal members thereby creating headrights, a term which is used to describe each of the fractional shares of the distributable income from the minerals underlying the tribal lands, together with a reversionary title to a like share of minerals whenever the mineral trust terminates. Under this Act accrued royalties resulting from mineral production from former tribal lands are placed in the United States Treasury and credited to the individual members of the tribe. Although this trust estate was initially created for a period of twenty-five years by statutory amendment, the trust period has been extended to 1983 (52 Stat. 1034, Sec. 3).

The Osage Allotment Act, supra. as amended, further provided for the issuance by the Secretary of Interior of "Certificates of competency" to adult Osage Indians who were "fully competent and capable of transacting his or her own business and caring for his or her own individual affairs." Pursuant to the Acts of Congress of June 28, 1906, 34 Stat. 539, April 18, 1912, 37 Stat. 86, March 3, 1921, 41 Stat. 1249, and February 27, 1925, 43 Stat. 1008, Osage Indians, such as the decedent in this case, with "Certificates of Competency" have been distributed all of the funds to their credit except unaccrued royalties and the interest payable thereon. The unaccrued royalties after becoming accrued royalties are distributed quarterly to those Osage Indians having "Certificates of Competency".

Thus, the Supreme Court of the State of Oklahoma held that pursuant to the decisions of this Court in *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948) *United*

States v. Mason, 412 U. S. 391 (1973), that the State of Oklahoma was permitted by Congress to impose upon the estates of deceased Osage Indians the Oklahoma "Estate, Inheritance and Transfer Tax", and, where the headrights represent unaccrued royalties, as in the instant case, arising from mineral interests in the State of Oklahoma, such headrights are an interest in land located in the State of Oklahoma, and governed by the law of the State of Oklahoma. Thus their transfer was taxable under the laws of the State of Oklahoma.

It is from this decision of the Supreme Court of the State of Oklahoma that Petitioners seek review.

REASONS FOR DENIAL OF WRIT

THE DECISION BELOW IS CLEARLY CORRECT AND NO CONFLICT OF DECISIONS EXISTS.

The Supreme Court of the State of Oklahoma clearly and unequivocably relied upon this Court's decision in *Oklahoma Tax Commission v. United States*, 319 U.S. 598 (1943), *West v. Oklahoma Tax Commission*, 334 U.S. 717 (1948), *United States v. Mason*, 412 U.S. 391 (1973), and *United States v. Noble*, 237 U.S. 74 (1914), in reaching its decision in this case. This decision is clearly correct and consistent with this Court's decision in the West and Mason Cases and no conflict exists between the Supreme Court of Oklahoma's decision and decisions of this Court.

While it is true that this Court in *United States v. Mason*, 412 U.S. 391, reached its decision upon other grounds, it is also true that this Court did conduct an extensive review of all of the law and cases cited by the taxpayers in that case and the executors in this case. This Court sought to determine whether or not the West Case, decided in 1948, was still the

controlling law. This Court in the Mason Case stated that while

> "... it might be fair to say that over the years the fringes of the West doctrine have been worn away. Its core holding remains unimpeached by any decisions of this or any other Court." (412 U.S. 391, 397)

The executors in this case have cited no new authorities since this Court rendered its decision in the Mason Case. No authorities are cited by the executors which question the continuing validity of the West doctrine, other than the Court of Claims decision in *Mason v. United States*, 461 F.2d 1364, 198 Ct. Cl. 599 (1972), which this Court reversed in *United States v. Mason*, 412 U. S. 391 (1973).

The executors' continued reliance upon this Court's holdings in *Squire v. Capoeman*, 351 U.S. 1 (1956), is misplaced. Therein this Court held that the profits from the sale of timber on the land of a Quinaielt Indian held in trust for him pursuant to the General Allotment Act, 25 U.S.C., Sec. 331 (25 U.S. C.S., Sec. 331), were immune from federal gains taxes. That case was distinguished in the Mason Case by Mr. Justice Marshall for the reasons that it involved a different tax by a different level of government on the trust properties of a different tribe held pursuant to a different statute and, in this area of taxation decisions relating to other types of taxes are not readily transferable to the area of estate and gift taxation where, as in the case now before this Court, the taxes are imposed not upon the property but upon the transfer of the property. See *United States v. Mason*, 412 U.S. 391, 396, and *West v. Oklahoma Tax Commission*, 334 U.S. 717.

The executors continue to rely upon the lack of taxation of the decedent's estate by the federal government as grounds for the non-taxation of deceased Osage Indians' estates by the State of Oklahoma. This contention is misplaced.

This Court speaking through Mr. Justice Marshall in *United States v. Mason*, 412 U.S. 391, held that it was

> "... obvious ... that Internal Revenue Decisions as to the scope of its own taxing power have no effect on the taxing power of the States." (412 U.S. 391, 398, footnote 8)

The executors argue that Congress has, in response to the request of this Court in the West Case, 334 U.S. 717, 727, affirmatively indicated that the burden of the Oklahoma "Estate, Inheritance and Transfer Tax" should be lifted from the estates of deceased Osage Indians. Clearly, Congress has not so indicated. That statute, 86 Stat. 1296 (25 U.S.C., Sec. 883c) provided that certain judgment funds would not ". . . be subject to federal or state income taxes." Clearly this statute granted immunity from Federal and State income taxation, but it did not in any way indicate that Congress intended to lift the burden of the Oklahoma "Estate, Inheritance and Transfer Tax" from the estates of deceased Osage Indians.

Twenty-eight years have elapsed since the West doctrine was announced. In those years Congress has in no way indicated that the estates of deceased Osage Indians should not be subject to the Oklahoma "Estate, Inheritance and Transfer Tax. Until such time as Congress so indicates, this Court's decision in *West v. Oklahoma Tax Commission*, 334 U.S. 717, must stand as the controlling case in favor of taxation of deceased Osage Indians' estates by the State of Oklahoma. The Supreme Court of the State of Oklahoma's decision in this Court and in the absence of any authorities to the contrary stands as the correct law.

The only question presented by this case which is different from those questions presented to this Court in the West and Mason Cases is the Supreme Court of Oklahoma's

determination that the headrights involved in this case represent unaccrued royalties and as such are includable in a non-resident Osage Indian's Oklahoma net taxable estate. Both this Court and the Supreme Court of the State of Oklahoma have determined and held that unaccrued rents and royalties, rents and royalties yet to be reduced to possession, represent an interest in minerals in place. See *United States v. Noble*, 237 U.S. 12 (1914) and *McCully v. McCully*, 184 Okl. 264, 86 P.2d 786 (1939).

The McCully Case, supra., held in accordance with and quoting *United States v. Noble*, supra., that:

> " 'the rents and royalties were profit issuing out of the land. When they accrued, they became personal property; but rents and royalties to accrue were a part of the estate remaining in the lessor. As such, they would pass to his heirs, and not to his personal representatives.' . . . It may be noted that in United States v. Noble, it is said that unaccrued rents and royalties would pass to the heirs of the lessor and not to his personal representative. The reason is that unaccrued royalty is real and not personal property." (184 Okl. 264, 266)

This Court has repeatedly held that the determination of the nature of Property is a question of state law and not national law. It is subject to the rule of *lex loci rei sitae*. See *In re Patmore's Estate*, 296 P.2d 863, 141 CA 2d 416 (1956), *Frew v. Bowers*, C.C.A.N.Y., 12 F.2d 625 (1926), dismissed *Bowers v. Frew*, 275 U.S. 578 (1927), *Clarke v. Clarke*, Conn., 178 U.S. 186 (1899), *Commissioner of Internal Revenue Service v. Skaggs*, C.C.A. Tex., 122 F.2d 771 (1921), cert. denied 315 U.S. 811 (1922).

The executors have not cited any authority under

which it could be said that the Supreme Court of the State of Oklahoma was in error when it held that these headrights represented interests in unaccrued royalties arising from mineral interests located in the State of Oklahoma which were real property and subject to the laws of the State of Oklahoma and not the State of Kansas.

The executors have in their "Petition for Writ of Certiorari to the Supreme Court of Oklahoma" shown no conflict of that decision with any decision of this Court except the cases of *United States v. Rickert*, 188 U.S. 432 (1903), *McCurdy v. United States*, 264 U.S. 484 (1924), and other decisions relied upon as authority for the immunity of Indian property from any form of state taxation. However, these decisions were met and discarded by this Court in the leading case of *West v. Oklahoma Tax Commission*, 334 U.S. 717, and *United States v. Mason*, 412 U.S. 391.

Thus, Petitioners have wholly failed to demonstrate that the decision of the Supreme Court of the State of Oklahoma is not in accord with the applicable decisions of this Court. They have also failed to demonstrate that special and important reasons exist for this Court's granting of certiorari to the Supreme Court of the State of Oklahoma. Thus, this should deny the Petitioners' request that a Writ of Certiorari be issued to the Supreme Court of the State of Oklahoma.

CONCLUSION

For all of the above and foregoing reasons it is respectfully urged that this Court should deny this Petition for Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Respectfully submitted,

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May, 1976

CERTIFICATE OF SERVICE

We hereby certify that on this the 12th day of May, 1976, we mailed copies of Respondent's Brief in Opposition to "Petiton for a Writ of Certiorari to the Supreme Court of Oklahoma", with postage prepaid thereon to:

The Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
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Washington, D.C. 20543

The Hon. Robert H. Bork, Esq.
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We further certify that all papers required to be served have been served upon all necessary parties.

s/_____
Donald B. Nevard, General Counsel

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